No. 92-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR PETITIONER

RICHARD G. TARANTO
Counsel of Record
JOEL I. KLEIN
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

JOHN H. KAZANJIAN
IRENE C. WARSHAUER
MARY BETH GORRIE
ANDERSON KILL OLICK & OSHINSKY, P.C.
666 Third Avenue
New York, NY 10017

STUART E. RICKERSON
Vice President-General Counsel
JOHN G. O'BRIEN
Associate General Counsel
KEENE CORPORATION
200 Park Avenue
New York, NY 10166

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1500 treats a claim in a non-Claims Court suit as "for or in respect to" a claim in the Claims Court when Congress has precluded the plaintiff from bringing both claims in the same court.

2. Whether 28 U.S.C. § 1500 prohibits adjudication of a case in the Claims Court when the plaintiff's related non-Claims Court action is no longer pending.

3. Whether the Federal Circuit's interpretation of 28 U.S.C. § 1500, if adopted by this Court, should be held not to bar petitioner's claims, under the doctrines of non-retroactivity or equitable tolling.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-166

KEENE CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. A1-A34) is reported at 962 F.2d 1013. The panel opinion of the court of appeals (Pet. App. D1-D30) is reported at 911 F.2d 654. The opinion of the Claims Court (Pet. App. E1-E27) is reported at 17 Cl. Ct. 146.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1992. This Court has jurisdiction under 28 U.S.C. § 1254. The petition for a writ of certiorari was filed on July 22, 1992, and granted on October 19, 1992.

STATUTE INVOLVED

Section 1500 of Title 28, U.S. Code—as amended on October 29, 1992, to change the name of the Claims Court to the "Court of Federal Claims" (Court of Federal

Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 902)—currently provides:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Prior to October 29, 1992, the provision was identical except that it referred to the "United States Claims Court." 28 U.S.C. § 1500 (1988). Prior to April 2, 1982—the effective date of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25—the only difference was that Section 1500 referred to the "Court of Claims." 28 U.S.C. § 1500 (1976). Section 1500 was enacted as part of the 1948 Judicial Code. Act of June 25, 1948, ch. 646, 62 Stat. 942.

STATEMENT

The Federal Circuit in this case held that 28 U.S.C. § 1500 required dismissal of petitioner Keene's contractual and constitutional monetary claims against the United States in the Claims Court—claims that sought to hold the United States responsible for its share of the massive asbestos-litigation burdens incurred by Keene. Overruling numerous prior decisions, the Federal Circuit concluded that Section 1500 requires dismissal whenever the plaintiff had pending elsewhere, at the time the Claims Court action was filed, a suit on claims growing out of the same operative facts—even if the other suit is no longer pending when a motion for dismissal is entertained and even if the law prohibited the plaintiff from bringing both claims in the same court. Keene seeks reversal of that ruling.

1. *Background*

Petitioner Keene Corporation was formed in 1967.[1] One year later, it acquired, for $8 million, most of the stock of Baldwin-Ehret-Hill, Inc. (BEH), which had been formed in 1959, when Ehret Magnesia Manufacturing Company (Ehret) merged with Baldwin-Hill Company (B-H). In 1970, BEH was merged into, and its business transferred to, another Keene subsidiary, Keene Building Products Corporation (KBPC). KBPC, BEH, and BEH's predecessors manufactured and sold thermal insulation products and acoustical products, some of which contained asbestos. *See* Pet. App. H2.

In the mid-1970s, plaintiffs began bringing personal injury suits against Keene and other manufacturers and sellers of asbestos or products containing asbestos. The suits claim injury resulting from exposure to asbestos, exposure that usually occurred decades earlier. Many of the cases involved exposure at shipyards run by the United States during World War II or from products made with asbestos fibers purchased from the United States or manufactured pursuant to government specifications.

The pace of asbestos-based filings has increased dramatically since the 1970s. Keene itself has been named a defendant in more than 156,000 cases. It has settled or tried almost 78,000 cases. Approximately 87,000 lawsuits are pending. New cases are being filed at an even greater rate: the rate of filings in 1992 is roughly 50 percent higher than in 1991; indeed, new filings outpace settlements and other dispositions of pending cases by a ratio of almost two to one. *See generally* Keene Corp. 1991 Annual Report.

To date, Keene has spent nearly $400 million in its litigation. Other former manufacturers and distributors of products containing asbestos have faced similar finan-

[1] For petitioner's statements pursuant to Rules 14.1(b) and 29.1 of the Rules of this Court, see Pet. 1 n.1.

cial burdens: at least 16 such companies have already collapsed under their weight, declaring bankruptcy or dissolving. *See* Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 Cardozo L. Rev. 1819, 1819 n.2 (1992). In July 1990, Keene proposed to resolve all meritorious personal injury claims against it through a compensation program making available 80 percent of its net worth, or approximately $190 million. *See* Keene Corp. 1991 Annual Report. By contrast, the United States has made no move to assume, and has steadfastly resisted all efforts to impose on it, any responsibility for asbestos injuries, despite its clear and knowing role in creating the problem. *See* Pet. App. H6-H15 (detailing Government knowledge and responsibility).[2]

2. *Keene's Tucker Act Suits in the Court of Claims*

a. *Keene I.* In December 1979, Keene brought a petition against the Government in the United States Court of Claims. *Keene Corp. v. United States*, No. 579-79C (Ct. Cl. 1979) (*Keene I*).[3] The petition sought recovery under the Tucker Act, 28 U.S.C. § 1491(a)(1), based on express and implied contracts between the United States and Keene's former subsidiary (KBPC) and its predecessors (BEH, Ehret, and B-H). Pet. App. H1-H2.[4] Alleging that the Government knew of asbestos hazards as far back as the 1930s (Pet. App. H6-H14), Keene's petition sought to recover from the Government some or all of the liability and costs incurred by Keene in thousands of cases. It rested this claim on (1) the Government's sale to Keene of asbestos fibers and (2) the Government's purchase from Keene of various insulation products containing asbestos. Based on the Government's control and inspection of workplaces, its superior knowledge of relevant hazards, and its specifications *requiring* the use of asbestos in certain products, the petition alleged that those contracts contained warranties (1) that the fibers sold to Keene were safe for their intended use at government facilities and (2) that Keene's costs in selling insulation to the Government would be limited by the Government's provision of adequate warnings to and protections for the intended users of the insulation. Pet. App. H15-H19.

In August 1980, the Government moved for summary judgment on several grounds, among them that Section 1500 deprived the Court of Claims of jurisdiction because Keene, after filing *Keene I*, had filed an action against the Government in the Southern District of New York under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.*, and other statutes. Motion for Summary Judgment at 26-27 (Aug. 1980).[5] In its reply brief, however, the Government abandoned the Section 1500 argument for "'tactical reasons.'" *Keene Corp. v. United States*, 12 Cl. Ct. 197, 199 (1987) (quoting declaration of government attorney), *aff'd sub nom. Johns-Manville*

---

[2] *See In re Eastern & S. Dists. Asbestos Litig.*, 772 F. Supp. 1380, 1384 (E. & S.D.N.Y. 1991) ("The Navy, though aware of the hazards posed by asbestos dust, in its urge to build its warships as quickly as possible, did not inform workers [at its shipyards] of the dangers and neglected to take available protective precautions."); Brickman, *supra*, at 1885-86.

[3] Cases in the Court of Claims were initiated by the filing of a "petition." The Court of Claims was abolished in 1982 and its trial jurisdiction transferred to the newly created Claims Court, where cases are initiated by the filing of a complaint. In October 1992, Congress changed the name of the Claims Court to the "Court of Federal Claims." Following the Federal Circuit's usage, we generally refer to the "Claims Court" in this brief, unless the focus on years prior to 1982 makes reference to the "Court of Claims" appropriate.

[4] We hereafter refer to "Keene" even when the statements refer more particularly to Keene's former subsidiary and its predecessors, whether before or after they became part of Keene.

[5] The New York case, filed *after Keene I*, is described below. *See* pages 7-8, *infra*.

The Government's motion did not mention or rely on the *Miller* third-party action filed by Keene *before* it brought suit in the Court of Claims. *See* pages 6-7, *infra*.

Corp. v. United States, 855 F.2d 1556 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989). Accordingly, when the Court of Claims denied the motion for summary judgment on May 1, 1981, it did not mention the Section 1500 issue. *See* J.A. 4-5; *Keene*, 12 Cl. Ct. at 200 (Claims Court later explained that the Section 1500 argument had not been ruled on because it was abandoned by the Government).

b. *Keene II.* On September 25, 1981, Keene filed a second petition in the Court of Claims seeking recovery from the United States under the Tucker Act. *Keene Corp. v. United States*, No. 585-81C (Ct. Cl. 1981) (*Keene II*). *See* Pet. App. F. This petition was founded not on contract rights but "upon the Constitution." 28 U.S.C. § 1491(a)(1). The Government had paid compensation for asbestos injuries to its employees (or former employees) under the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.*, taking the position that its liability was limited to such amounts. It then recouped those payments, under 5 U.S.C. § 8132, from any employees who had received payments from Keene. Pet. App. F9-F10. Keene sought recovery of the recouped amounts on the ground that, because the Government was in fact responsible for the injuries, the recoupment constituted a taking of Keene's property and deprivation without due process of law. Pet. App. F10-F11.

Discovery proceeded for several years in both *Keene I* and *Keene II*. In November 1984, the two cases were consolidated for further discovery with each other and with several other Claims Court actions against the United States brought by various manufacturers of asbestos-containing products: GAF Corporation, H.K. Porter Co., Fibreboard Corporation, Raymark Industries, Inc., UNR Industries, Inc., Eagle-Picher Industries, Inc., and Johns-Manville Corp. Pre-trial discovery and other preparations continued for several more years.

3. *Keene's non-Tucker Act Suits*

a. *The Third-Party Action in Miller.* In June 1979—several months before the filing of *Keene I* in the Court

of Claims—Keene impleaded the United States by filing a third-party complaint in one individual's personal injury suit in the district court in the Western District of Pennsylvania. *Miller v. Johns-Manville Prods. Corp.*, No. 78-1283E (W.D. Pa. Oct. 31, 1979) (*Miller*). *See* Pet. App. I. Keene sought contribution and/or indemnity from the United States, alleging that, if it was liable to Miller, the Government was jointly and severally liable because Miller's alleged exposure to asbestos products was to products supplied by the Government or to the Government under Government specifications or contracts requiring use of asbestos. *Id.* at I2-I3. Keene brought these claims solely under the FTCA, 28 U.S.C. §§ 1346(b), 2674. *See* Pet. App. I2 (paragraphs 3, 4, relying exclusively on FTCA); *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 198 (1983) (citing earlier cases).

In April 1980—after *Keene I* had been filed—Keene moved under Fed. R. Civ. P. 41 for voluntary dismissal, without prejudice, of its third-party complaint against the United States in *Miller*. Pet. App. G. The motion referred to *Keene I* and stated that the decision in that case "should resolve the differences between the parties." Pet. App. G2. The third-party complaint was dismissed in May 1980. *See* Pet. App. E15.

b. *The Action in New York.* In January 1980—two weeks after *Keene I* was filed in the Court of Claims—Keene brought suit against the United States in the Southern District of New York. *Keene Corp. v. United States*, No. 80-Civ.-0401GLG (Jan. 2, 1980); J.A. 6-40 (amended complaint). The complaint, generally an action for contribution or indemnity, sought recovery from the United States for some or all of the liability and costs incurred by Keene in the thousands of suits where claimants' asbestos exposure involved the Government. The complaint stated no claims under the Tucker Act. Most counts of the complaint asserted liability under the FTCA, stating various theories including breach of implied warranties, strict liability, failure to warn of risks, failure to design a safe product, and other negligence. Other

counts asserted claims and jurisdiction under the Federal Employees' Compensation Act; under admiralty law, the Suits in Admiralty Act, and the Extension of Admiralty Jurisdiction Act, 28 U.S.C. § 1333 and 46 U.S.C. §§ 740-52; under the Public Vessels Act, 46 U.S.C. §§ 781-90; and under 28 U.S.C. § 1331 and the common law. *See* J.A. 6-40.

On September 30, 1981—after *Keene II* had been filed in the Court of Claims—the district court granted the Government's motion to dismiss the action for lack of subject matter jurisdiction. J.A. 41-57. The court held that the FTCA claims were jurisdictionally barred because Keene's omnibus administrative notice covering thousands of existing and future claims did not satisfy the requirement of the FTCA, 28 U.S.C. § 2675: in particular, they did not state a "sum certain" giving specific information about each underlying claim. J.A. 43-50. The court also held that Keene's claims all fell outside the other heads of jurisdiction asserted, including admiralty jurisdiction (J.A. 50-54; *id.* at 54-56). The court noted that, to the extent that Keene had constitutional claims, those belonged in the Court of Claims. J.A. 56-57. On February 10, 1983, the Second Circuit affirmed the dismissal for want of jurisdiction, essentially for the reasons given by the district court. *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983).

c. *The Action in the District of Columbia.* On July 28, 1982, while the New York case was on appeal to the Second Circuit, Keene, having sought to cure the defects in its administrative filings, brought a second omnibus action against the United States, this time in the district court for the District of Columbia. *Keene Corp. v. United States*, No. 82-2120 (D.D.C.). In August 1983, the Government moved to dismiss for lack of jurisdiction, relying on the Second Circuit decision. The district court granted the motion on July 31, 1984, holding that the jurisdictional rulings in the New York action had preclusive effect in this action and equally required dismissal.

In particular, the court held that Keene's new administrative notice under the FTCA was inadequate because it failed to state specific amounts for each asbestos claimant. *Keene Corp. v. United States*, 591 F. Supp. 1340, 1348-49 (D.D.C. 1984). That decision was affirmed by the D.C. Circuit on May 5, 1987. *GAF Corp. v. United States*, 818 F.2d 901, 912-16 (D.C. Cir. 1987).

4. *The Claims Court and Federal Circuit Rulings on the Meaning of "Claim"*

Pre-trial preparations proceeded in the Claims Court in *Keene I* (filed in 1979) and *Keene II* (filed in 1981), along with the consolidated cases, until 1987. (In none of Keene's three actions in district court—one voluntarily dismissed, two dismissed on jurisdictional grounds—had there been comparable pre-trial discovery and proceedings against the United States on the merits.) In March 1987, shortly before trial was set to begin in one of the Johns-Manville cases, the Government moved to dismiss *Keene I* and *Keene II* (and the consolidated cases) under 28 U.S.C. § 1500. The Government did not, however, raise the issue on its own. Rather, the motion resulted from the Claims Court's *sua sponte* order directing the Government "to state its position on the applicability of 28 U.S.C. § 1500." *Keene Corp.*, 12 Cl. Ct. at 199.

The Claims Court declined to rule on the motion with respect to Keene's suits and limited its ruling to Johns-Manville's actions. *Keene Corp.*, 12 Cl. Ct. at 198 n.1 (April 6, 1987). The court held that those actions were barred by Section 1500 based on still-pending actions that, while filed under the FTCA rather than the Tucker Act, alleged similar facts and sought similar relief. 12 Cl. Ct. at 199-216; *see Johns-Manville*, 855 F.2d at 1558. The court did not, however, dismiss the cases outright. Instead, following *Brown v. United States*, 358 F.2d 1002, 175 Ct. Cl. 343 (1966), the court ordered dismissal unless Johns-Manville proceeded to dismiss the still-pending actions in the other courts. 12 Cl. Ct. at 212, 216.

On appeal from that ruling, the Federal Circuit, over a dissent, affirmed. *Johns-Manville*, 855 F.2d 1556. The court held that the term "claim" in Section 1500 is defined by "the operative facts alleged, not the legal theories raised," at least for a given type of relief sought (monetary versus equitable). *Id.* at 1563, 1567. The claims in two cases—one in the Claims Court, another in a different court—were the same under Section 1500, therefore, if they both sought monetary relief arising from the same operative facts. And that was so, the court held, even if Congress's division of jurisdiction (*e.g.*, assigning FTCA claims to the district courts and Tucker Act claims for more than $10,000 to the Claims Court) prohibited the plaintiff from bringing the two claims in the same court. *Id.* at 1564-67. The Federal Circuit, like the Claims Court, engaged in a detailed analysis of the operative facts in Johns-Manville's claims in its various actions and found them the same as those of the Claims Court action. *Id.* at 1563-64. The Federal Circuit did not disturb the Claims Court's ruling that dismissal would not be required under Section 1500 if Johns-Manville went ahead and dismissed the related non-Claims Court actions.

5. *The Claims Court's Dismissal of Keene I and II*

In November 1988, after the Federal Circuit's decision in *Johns-Manville*, the Government filed a motion for summary judgment in *Keene I* and *Keene II* (and the other companies' cases) on Section 1500 grounds. Although none of Keene's three other actions against the United States was any longer pending, the Claims Court granted the motion and dismissed both of Keene's cases because, at the time they were filed (7 and 9 years previously), Keene had other suits on the same "claim" pending in other courts. Pet. App. E5, E18-E27.[6] The court first

[6] The Claims Court mistakenly believed that the Federal Circuit in *Johns-Manville* had already ruled that the dispositive statutory question was whether the non-Claims Court action was pending at the time the Claims Court action was filed. In fact, that issue was not presented in *Johns-Manville*, because the non-Claims Court actions there were still pending when the Claims Court addressed the Section 1500 issue.

concluded that Keene's various actions all sought the same relief based on the same operative facts and therefore involved the same "claim" for purposes of Section 1500. *Id.* at E19-E21. It then held that *Keene I* was barred because it was filed while *Miller* was still pending (on December 21, 1979) and the voluntary dismissal of *Miller* a few months later (in May 1980) did not lift the bar. *Id.* at E24-E25. *See also id.* at E26 n.8 (noting that Keene's 1981 New York action, filed after *Keene I*, might bar that suit as well). The Claims Court did not separately discuss *Keene II*—filed shortly after Keene brought its omnibus New York action—but dismissed it as well. Pet. App. E27.

6. *The Federal Circuit's Decisions*

a. *The Panel Decision.* In 1990, a divided panel of the Federal Circuit reversed the Claims Court decision as to Keene. Pet. App. D1-D30. The court concluded first that neither Section 1500's text nor the legislative history of its progenitor (an 1868 Act) provided a plain answer to the question of *when* the non-Claims Court action has to be "pending" to raise Section 1500's bar to the Claims Court case. Pet. App. D8-D16. Looking then to the nature and policy of Section 1500 as reflected in extensive precedent, the court held that a Claims Court action should not be dismissed under Section 1500 if no other suit is pending at the time the court entertains and acts on the motion to dismiss. *Id.* at D16-D24.

The court observed that the function of Section 1500 was not to define the Claims Court's subject matter jurisdiction (unlike 28 U.S.C. § 1331 or 1332 or 1491): after all, the Tucker Act clearly provides jurisdiction over these cases. Instead, the provision serves merely as a bar to forcing the Government "to defend the same suit in two different courts at the same time." Pet. App. D18. Since the provision is therefore aimed only at the sequencing of suits—while the rules of preclusion

protect the Government against truly duplicative litigation (*id.* at D13)—the panel concluded that the Section 1500 "has pending" inquiry does not appropriately focus on the time the Claims Court action was filed. Rather, once the non-Claims Court actions are no longer pending, there is no basis for the court to invoke Section 1500 and dismiss the action. *Id.* at D16-D24. Because Keene's actions in courts other than the Claims Court had long since been dismissed, the panel held, *Keene I* and *Keene II* should not have been dismissed. *Id.* at D25.

Judge Mayer dissented. Pet. App. D26-D30. In his view, because Section 1500 speaks of "jurisdiction," its plain meaning required dismissal if another suit was pending at the time of the filing in the Claims Court. *Id.* at D26-D28. He acknowledged that his view was arguably inconsistent with *Brown v. United States*, *supra*, and urged the overruling of *Brown*. Pet. App. D28-D29. He also urged the overruling of *Tecon Eng'rs, Inc. v. United States*, 343 F.2d 943, 170 Ct. Cl. 389 (1965), *cert. denied*, 382 U.S. 976 (1966). Pet. App. D30.

b. *The En Banc Decision.* Upon rehearing *en banc*, the Federal Circuit, in an opinion by Judge Mayer, disagreed with the result reached by the panel and affirmed the Claims Court's dismissal of the actions under Section 1500. Pet. App. A1-A24. Undertaking a general reconsideration of Section 1500, the court concluded that the statute was designed not only "to prevent simultaneous dual litigation against the government" but also "to force an election of forum" even when a single forum was statutorily barred from entertaining all of the plaintiff's causes of action. Pet. App. A14. Based on that view of the statute's purpose, and what it viewed as the statute's "plain language," the court held that a Claims Court suit must be dismissed if, as with Keene's suits, another action on the same claim was pending at the time the Claims Court suit was filed, regardless of whether the other action had since been dismissed. *Id.* at A15-A17. The court explained that "[i]t is fundamental that jurisdiction is established, if at all, at the time suit is filed"

and that "[a]ll jurisdictional rules are absolute." *Id.* at A17. The court recognized that to reach its result it had to, and it accordingly did, overrule *Brown v. United States*, *supra*, which held that dismissal was improper once the related actions against the Government, though pending when the Court of Claims suit was filed, were "no longer pending." 358 F.2d at 1004. Pet. App. A17.

The court also overruled three other established precedents—*Casman v. United States*, 135 Ct. Cl. 647 (1956); *Hossein v. United States*, 218 Ct. Cl. 727 (1978); *Boston Five Cents Sav. Bank, FSB v. United States*, 864 F.2d 137 (Fed. Cir. 1988). Pet. App. A17 n.3, A22. All of those decisions relied on and applied the principle that Section 1500 does not apply—the "claims" are not the same—where the claims filed in the Claims Court and those pending in another court could not, under federal jurisdictional statutes, be brought in the same forum. The Federal Circuit overruled those decisions as inconsistent with its view that Section 1500 must be read rigidly and absolutely, unaffected by considerations of equity, as barring "all claims on whatever theories that 'arise from the same operative facts.'" Pet. App. A20.

Finally, the Federal Circuit overruled *Tecon Engineers* and held that, even if jurisdiction was proper at the time of filing in the Claims Court, jurisdiction is lost if another sufficiently similar action is thereafter filed in another court. Pet. App. A15, A18-A19. The court reached this result even though it had held, in overruling *Brown*, that Section 1500 must apply at the moment of filing in the Claims Court because it stated a true "jurisdictional" rule. The court acknowledged that "it is axiomatic that once jurisdiction attaches, subsequent activities by the parties do not affect it." Pet. App. A18. But, the court said, "the result here occurs by operation of law." *Ibid.*[7]

[7] The court further held that its ruling must be retroactive, even though it recognized the hardship that its rewriting of the law would cause.

Chief Judge Nies concurred but wrote separately to suggest that, in light of the court's newly stringent interpretation of Section 1500, the precedent declaring equitable tolling of statutes of limitations not to be available (*Ball v. United States*, 137 F. Supp. 740, 133 Ct. Cl. 841, *cert. denied*, 352 U.S. 827 (1956)) should be reconsidered where jurisdictional limits prevented the plaintiff from bringing all of its claims in the same forum. Pet. App. A24. Chief Judge Nies observed that this Court's decision in *Irwin v. Veterans Admin.*, 111 S. Ct. 453 (1990), holding equitable tolling to be available against the Government, supported such a reconsideration. *Ibid.* Judge Plager dissented from the majority's ruling, restating many of the reasons set forth in the panel opinion. Pet. App. A25-A34.

SUMMARY OF THE ARGUMENT

The Federal Circuit construed Section 1500 as establishing a rigid jurisdictional restriction whose function is to deprive persons injured by the United States of rights Congress has made available to them. That construction, which hardly follows from the terms of the statute, marks a radical departure from decades of settled precedent and is fundamentally out of keeping with present congressional policy against any such forfeitures of legal rights. This Court should restore the provision to its properly limited role as a sensible tool for coordinating multiple litigation against the Government.

The Federal Circuit first adopted an erroneous standard for deciding when a "claim" in one case is "for or in respect to" a "claim" in another. Section 1500 is naturally read, with reference to the law of claim preclusion, to treat claims as the same under that standard only if bringing them separately against the Government would be improper claim-splitting. Where, as in this case, Congress has affirmatively forbidden the joinder of claims—by insisting that they be brought in different courts—they cannot be deemed the same for purposes of

Section 1500. This was the well-established law overruled by the Federal Circuit here. *See, e.g., Allied Materials & Equip. Co. v. United States*, 210 Ct. Cl. 714 (1976); *Casman v. United States*, 135 Ct. Cl. 647 (1956).

The court of appeals' reading would lead directly and predictably to unjustified delays in adjudication and unauthorized sacrifice of rights against the Government: multiple suits are a well-recognized reality under the complex legal and jurisdictional schemes that govern claims against the Government. Yet Congress has not provided for forced elections among rights in cases like this (*see Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980)); to the contrary, loss of rights by unavoidable jurisdictional "errors" is plainly offensive to current statutory policy (28 U.S.C. § 1631; *Irwin v. Veterans Admin.*, 111 S. Ct. 453 (1990)). The Federal Circuit's approach violates these clear policies and, in addition, is needlessly hard to apply. The court's approach, moreover, cannot fairly be derived from the legislative history behind the 1868 precursor to Section 1500. In fact, preclusion law, together with the traditional power to stay proceedings where appropriate, fully serves the statutory policy of protecting the Government against truly duplicative litigation.

The Federal Circuit also adopted an erroneous rule that jurisdiction to adjudicate a case is lacking whenever the related non-Claims Court case was pending on the day the Claims Court case was filed. This holding, based on the court's view of the term "jurisdiction" in Section 1500, derives simply from a borrowing and rigid application of the time-of-filing rule for determining diversity jurisdiction. That analogy, however, is not required or appropriate in the present setting.

The court of appeals and the Government themselves reject the analogy when they assert that post-filing events can and do defeat jurisdiction—*i.e.*, that even if Claims Court jurisdiction is initially present, it is lost by a sub-

sequent filing in another case. Moreover, even in the diversity context, the time-of-filing rule is not rigid, but is applied with an eye to practicalities, so as to allow "retroactive cures" of jurisdictional defects by post-filing events. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). The statutory language of Section 1500 —in the context of surrounding provisions' references to jurisdiction "to render judgment"—*a fortiori* allows for such an approach. Flexibility is particularly warranted because, at most, the provision merely places a timing limit on the exercise of subject matter jurisdiction that has plainly been granted to the court. *See, e.g., Irwin v. Veterans Admin., supra*; *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Properly read, then, Section 1500 permits adjudication of a case once the related non-Claims Court action is no longer pending. This was the well-established law overruled by the Federal Circuit here. *See, e.g., Hossein v. United States*, 218 Ct. Cl. 727 (1978); *Brown v. United States*, 358 F.2d 1002, 175 Ct. Cl. 343 (1966). The policy of Section 1500 is fully satisfied by the availability of preclusion principles and the authority to stay proceedings where necessary to prevent duplicative litigation.

Finally, even if this Court adopts the Federal Circuit's reading of Section 1500, Keene should not be prevented from pursuing its claims. Given the Federal Circuit's wholesale overruling of clear law, on which Keene justifiably relied, the doctrine of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), calls for non-retroactive application of the new reading of Section 1500. And in any event, equitable tolling of the statute of limitations should be available to allow Keene to pursue these claims by way of new pleadings in this case (*see* Fed. R. Civ. P. 15) or a new case. *See Irwin v. Veterans Admin., supra.* Keene should not be suddenly deprived of its opportunity to litigate its claims after it is too late to protect itself from loss of its legal rights.

ARGUMENT

I. THE FEDERAL CIRCUIT MISCONSTRUED SECTION 1500 AS BARRING THE CLAIMS COURT FROM ADJUDICATING PETITIONER'S CLAIMS.

The Federal Circuit's holding that Section 1500 barred the Claims Court from adjudicating Keene's two suits rested on two conclusions. First, the court of appeals held that two actions involve the "same" claim—*i.e.*, the non-Claims Court action is "for or in respect to" the claim in the Claims Court action—whenever they grow out of the same "operative facts," even if Congress has made clear that they are different in that the plaintiff (a) is entitled to bring both claims and (b) must bring them in separate suits in separate forums. Second, the court of appeals held that Section 1500 flatly bars the adjudication of a claim filed in the Claims Court whenever, at the time of that filing, the plaintiff had pending elsewhere another action for or in respect to the claim—even if the other action is no longer pending when the Claims Court adjudicates its case or acts on a motion to dismiss under Section 1500.

Rejection of either of these rulings requires reversal of the decision below. In fact, both rulings are wrong. At bottom, the flaw underlying both rulings is the same: they fundamentally misconstrue Section 1500 as a rigid and absolute jurisdictional restriction designed to force an election between remedies Congress has made available to persons harmed by the United States. But Section 1500 is a much more modest provision, designed simply to specify the order in which the Government must try multiple suits brought (as Congress has demanded) in different forums. This provision is not properly read to deprive Keene of the ability to have its claims against the United States in these cases heard by the Claims Court or, therefore, at all.

A. A Plaintiff's Claim in Another Case Against the United States Is Not "For or in Respect to" Its Claim in the Claims Court if the Plaintiff Is Required by Law to Bring the Two Claims in Different Cases.

The critical language of Section 1500 demanding a comparison of the claim in the Claims Court with the claim in another court is anything but precise. The latter suit must be "for or in respect to" the "claim" in the former. As the Federal Circuit itself recognized, this standard hardly has a single "plain" meaning. *See Johns-Manville*, 855 F.2d at 1560; *id.* at 1560 ("claim" is equivalent to "cause of action," which has no clear or uniform meaning); *United Mine Workers v. Gibbs*, 383 U.S. 715, 722, 724 (1966) ("cause of action" had no clear meaning in 1930s and remains "the source of considerable confusion").[8]

Notwithstanding this imprecision, the language and policy of Section 1500, as well as the precedent applying it and practical considerations, point strongly toward an interpretation different from that adopted by the Federal Circuit. The statute should be read to deem a claim in one case "for or in respect to [the claim]" in another only when ordinary claim-splitting preclusion principles would say that they should (and, therefore, could) be brought together if they were both brought against the United States. Any other reading (especially if combined with the Federal Circuit's "has pending" ruling) would produce predictable injustice in violation of established congressional policies. And the Federal Circuit's

[8] Indeed, it is only through judicial construction that the term "claim" in the Tucker Act has been limited to monetary claims, even though it is not so restricted in numerous other contexts. *See Lee v. Thornton*, 420 U.S. 139 (1975); *Richardson v. Morris*, 409 U.S. 464 (1973); J. Steadman, D. Schwartz, S. Jacoby, *Litigation with the Federal Government* § 6.113 (2d ed. 1983).

"operative facts" interpretation, aside from ignoring the natural reference to preclusion law and producing such unjust consequences, is hard to apply and rests on a misunderstanding of, and overreliance on, the original meaning of the 1868 precursor to Section 1500.

1. *Section 1500 Applies Only When Preclusion Law Would Prohibit Separate Suits on the Two Claims if Both Were Brought Against the United States.*

The language and function of Section 1500 naturally point to the law of claim preclusion, or res judicata, as the best source for construing the provision. That body of law—particularly, the law governing "claim-splitting"—is the obvious place to look for guidance when construing a statute that uses the term "claim" (and also the phrase "cause of action") and that addresses when two claims may be litigated in separate cases. The terms "claim" and "cause of action" were precisely the terms of res judicata law in the nineteenth century. *See Cromwell v. County of Sac*, 94 U.S. 351, 353 (1877). And reference to claim-splitting law is likewise suggested by the undisputed policy against simultaneous dual litigation that underlies Section 1500. *See* U.S. Br. in Opp. 10 ("Section 1500 bars the Claims Court from exercising jurisdiction whenever a plaintiff seeks to litigate duplicative claims in the Claims Court and in another court at the same time.") (citing *In re Skinner & Eddy Corp.*, 265 U.S. 86, 95 (1924)).[9]

While naturally read as referring to the law of claim preclusion in using the phrase "claim for or in respect to,"

[9] As discussed below (*see* pages 30-31, *infra*), moreover, although it is undisputed that Section 1500, like its predecessors, does not actually impose a preclusion rule, the 1868 precursor to Section 1500 was enacted in response to a specific limitation in the law of res judicata. *See Matson Navigation Co. v. United States*, 284 U.S. 352, 355-56 (1932) (1868 law was reaction to fact that the "other" suit "would not be res adjudicata in the suit pending in the Court of Claims"). This, too, supports reference to preclusion law in interpreting the statute.

the statute insists that no strict mutuality requirement limit its application. Thus, ever since the enactment of the 1868 precursor to Section 1500, the statute has provided that its rule would apply whenever the defendant in the non-Court of Claims action was acting under the authority of the United States. *See* note 16, *infra* (quoting predecessors to Section 1500). Indeed, until 1948, the statute applied *only* when there was non-mutuality, *see Matson*, *supra*, presumably because there were relatively few occasions before the enactment of the FTCA in 1946 when the United States (in contrast to its agents) could be sued at all outside the Court of Claims. Thus, Congress has insisted that, as long as the defendants are either the Government or its agents, the determination whether the claim in one case is "for or in respect to" the other must treat the agents as if they were the Government.

These considerations lead to an obvious interpretation of Section 1500. A claim brought outside the Claims Court is "for or in respect to" a claim in the Claims Court when claim-splitting law would treat them as the same—*i.e.*, require them to be joined in a single suit—if the two claims were both brought against the United States. On the other hand, the two claims do not bear that relationship—are not the "same"—when they *could* be brought separately if both were brought against the United States. In the usual Section 1500 case, then, where the two claims *are* both brought against the United States, the question is simply whether the law allows them to be brought separately—*i.e.*, does the bringing of the claims in separate suits constitute improper claim-splitting?

This test makes reference to an established body of law for its application. And in many, perhaps most, cases under Section 1500, including the present case, it is very easy to apply. For obvious reasons of fairness, preclusion law has long allowed separate and successive suits where, by law, a single court does not have jurisdiction to hear both claims and the plaintiff is legally entitled

to pursue both claims. *See* Restatement (Second) of Judgments § 24 comment a, § 26(1)(c) & comment c (1982); Restatement of Judgments § 62(a) & comment k, § 65(2) & comments g-k (1942). Under that principle, there is no Section 1500 bar when the claims in the Claims Court are within that court's exclusive jurisdiction—and thus could not have been joined in a single suit with the claims, independently available to the plaintiff, over which the other court had jurisdiction.

That principle readily resolves this case. Both *Keene I* and *Keene II* were brought under the Tucker Act for more than $10,000; none of the three other actions at issue was brought under the Tucker Act. The Tucker Act suits could only have been brought in the Court of Claims. 28 U.S.C. § 1491; *see* J.A. 28-29; *Keene*, 700 F.2d at 845 n.13. The non-Tucker Act claims—notably, the claims under the FTCA—could not have been brought in the Court of Claims, but had to be brought in district court. 28 U.S.C. § 1346(b). And it is clear that Congress intended a person injured by the Government to be entitled to pursue both Tucker Act and non-Tucker Act remedies, notably relief under the FTCA. *See Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980) (noting particularly that the Government agreed with this conclusion). Thus, the law not only allowed, but required, Keene's "claim splitting." That is enough to establish that the non-Tucker Act claims were not "for or in respect to" the Tucker Act claims.[10]

---

[10] There is another reason why claim-splitting principles would not require dismissal of *Keene I* based on *Miller*, the only other case pending when *Keene I* was filed. *Miller* sought contribution and indemnity for the costs of one particular claimant in one case; *Keene I* sought recovery for thousands of additional and separate injuries to Keene Corp. Keene was not required to bring these claims together: indeed, it could have separately filed third-party actions against the United States in each of thousands of the underlying suits. At most, Miller's claim would have to be excised from *Keene I* (if it is included there). *See* Restatement (Second) of Judgments § 24.

It would be an odd construction of Section 1500 that would preclude a single action in the Claims Court in favor of thousands of

Indeed, any other conclusion would be hard to square with the congressional jurisdictional scheme. Congress has insisted that, whatever the difficulties of drawing the line in some cases, claims must be rigidly separated into those cognizable under the Tucker Act and those, like FTCA claims, that are not. The need for separation follows directly from the assignment of the claims to different courts. It would be highly anomalous, in light of this congressional treatment, to read Section 1500 in such a way as to treat an FTCA claim as effectively the same as a contract or takings claim under the Tucker Act.

Not surprisingly in light of these considerations, it was the clear law in the Court of Claims that Section 1500 did not apply where two claims could not both be brought in the same court. Thus, in *Casman v. United States*, 135 Ct. Cl. 647 (1956), the court held that a claim for reinstatement and a claim for damages must be different claims under Section 1500 because only the latter could be brought in the Court of Claims. In *Allied Materials & Equip. Co. v. United States*, 210 Ct. Cl. 714 (1976), the Court of Claims, relying on *Casman*, concluded that even two claims for monetary relief were not the same for purposes of Section 1500 if, because of the congressional jurisdictional scheme, they could not both be brought in a single court. *Id.* at 716 ("In neither court could [plaintiff] combine all its claims."). These principles were subsequently followed. *See, e.g., Prillman v. United States*, 220 Ct. Cl. 677 (1979) (following *Allied Materials* principle); *Boston Five Cents Sav. Bank v. United States*, 864 F.2d 137, 139 (Fed. Cir. 1988) (following *Casman*).

These principles deserve respect under the doctrine of *stare decisis*. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Beyond that, they were, in fact, established law when Congress "reenacted" Section 1500 in 1982, without change of anything but the court to

---

separate suits against the Government in district courts throughout the Nation.

which it applied: it newly applied to the Claims Court, which assumed the trial jurisdiction of the former Court of Claims. This Court has repeatedly applied the rule of statutory construction that "a reenactment, of course, generally includes the settled judicial interpretation. *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978)." *Pierce v. Underwood*, 487 U.S. 552, 567 (1988)."[11] The 1982 legislation was the legal equivalent of a ratification of this settled practice through reenactment, because the practice is fully in harmony with surrounding law and because the 1982 enactment resulted from a broad congressional examination of the structure of the Court of Claims and of its jurisdiction, and included various substantive jurisdictional amendments, where Congress thought them necessary, along with the reorganization of the courts. *See, e.g.*, 28 U.S.C § 1491(a)(3) (adding certain equitable-relief powers), § 1631 (power to transfer rather than dismiss case where jurisdiction is lacking); S. Rep. No. 275, 97th Cong., 1st Sess. 1-41 (1981); *id.* at 22 ("Under existing law, this chapter [91] sets forth the jurisdiction of the Court of Claims. With the exception of Federal Tort Claims Act cases noted below, claims court jurisdiction is the same as Court of Claims trial jurisdiction.").

2. *The Federal Circuit's "Operative Facts" Approach Is Vague and Produces Injustice Contrary to Clear Congressional Policy.*

The Federal Circuit adopted a very broad conception of when two claims are the "same" for purposes of Section 1500 (or, more precisely, when one is "for or in respect to" another). Overruling *Casman* and its progeny, the court concluded that, regardless of whether two claims

---

[11] *See also, e.g., Johnson v. Home State Bank*, 111 S. Ct. 2150, 2155 (1991); *Cottage Sav. Ass'n v. Commissioner*, 111 S. Ct. 1503, 1509 (1991); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382 & n.66 (1982); *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979); *United States v. Board of Comm'rs*, 435 U.S. 110, 132-35 (1978); *Georgia v. United States*, 411 U.S. 526, 533 (1973).

should or even could be brought in the same suit, they are to be deemed the same if they grow out of the same "operative facts." But this approach not only runs afoul of *stare decisis* and the 1982 congressional ratification of clear pre-1982 law, but ignores the fact that, with only the exception of mutuality requirements, Section 1500 is naturally read to refer to claim-splitting law, which does *not* apply where jurisdictional barriers preclude joinder of claims in the same case. The approach would also violate other directly relevant congressional and judicial policies.

To begin with, the Federal Circuit's approach is indefinite and hard to apply. It demands a complex inquiry to determine whether the "operative" facts of two cases are the same. *See Johns-Manville*, 855 F.2d at 1563-67; *Keene Corp.*, 12 Ct. Cl. at 197-216. More fundamentally, a test requiring identification of the "operative" facts hardly provides clear guidance to courts or litigants on a question—whether a court has jurisdiction—that should not consume substantial resources or lead to needless confusion, at least where parties would thereby lose rights without means of self-protection. The interpretation we propose, by contrast, will in most cases be easy to apply: it simply requires asking whether the plaintiff's claim in another court is within the concurrent jurisdiction of the Claims Court. That question will rarely be difficult to answer: the core of jurisdiction in the Claims Court is exclusive (*see* 28 U.S.C. § 1491), with the most notable exception being jurisdiction under the Little Tucker Act, 28 U.S.C. § 1346(a), where concurrent jurisdiction turns simply on the amount sought (above or below $10,000). The Federal Circuit's vaguer approach impairs the unquestioned policy against needless complexity of litigation. *See, e.g.*, S. Rep. No. 275, *supra*, at 11; 127 Cong. Rec. 29888 (Dec. 8, 1981) (Sen. Simpson).

Aside from its intrinsic defects, the Federal Circuit's approach is critically flawed because its consequences

would be deeply out of harmony with the relevant legal landscape. This Court has made clear not only that Congress did not intend that persons would have to choose among the differing remedies offered them for Government-inflicted harm (*Hatzlachh Supply Co., supra*) but that the Tucker Act was intended to be construed to provide justice to such persons.[12] In 1982, moreover, Congress directly acted to preclude the loss of rights through the running of statutes of limitations by virtue of jurisdictional defects: that was the announced purpose of the enactment of 28 U.S.C. § 1631, based on the recognition that jurisdictional complexities make such defects unavoidable. *See* S. Rep. No. 275, *supra*, at 11. And, as this Court has now made clear, Congress has adopted the same policy indirectly through its implicit authorization of the tolling of statutes of limitations where limitations periods have run through no fault of the plaintiff. *See Irwin v. Veterans Admin.*, 111 S. Ct. 453 (1990). All of these policies would be impaired by the apparently intended results of the Federal Circuit's ruling.

The well-recognized fact is that it is often difficult for a plaintiff to determine what cause of action properly fits its real complaint against the Government—or, therefore, where to sue. *See* S. Rep. No. 275, *supra*, at 11. Moreover, there are many circumstances where complete adjudication of a plaintiff's legal rights against the Government, and complete relief, plainly require filing in two

---

[12] *See United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32 (1915) (it is an "inadmissible premise that the great act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye"); *United States v. Mitchell*, 463 U.S. 206, 213-14 (1983) (quoting President Lincoln's statement, in proposing law that permitted Court of Claims to render final judgments, that "it is 'as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals' "; surveying purpose of Tucker Act to " 'give the people of the United States what every civilized nation of the world has already done—the right to go into the courts to seek redress against the Government for their grievances' ").

courts. For example, an injury by the Government may well, as here, give rise to legitimate claims sounding in tort and in contract: these claims must be brought in different courts (if more than $10,000 is sought). And the Claims Court, which until recently was all but precluded from awarding equitable relief, even today has power to award equitable relief in only defined classes of cases. 28 U.S.C. § 1491(a)(2), (a)(3).[13] In many cases, therefore, unlawful or wrongful action by the Government must be challenged in district court to stop it, with damages sought separately in the Claims Court.[14] Thus, dual "related" suits based on the same "operative facts" are inevitable.

In these and other situations, persons harmed by the Government would be unfairly burdened by the Federal Circuit's rule that no claims growing out of the same "operative facts" could be brought simultaneously in the Claims Court and elsewhere. In many situations, judicial efficiency would independently counsel that at least pretrial discovery and other proceedings move ahead on the separate claims in the Claims Court. This is true, for example, where the "other" action is being seriously challenged on jurisdictional grounds, so that no litigation on

[13] *See Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988) ("The Claims Court does not have the general equitable powers of a district court to grant prospective relief. Indeed, we have stated categorically that 'the Court of Claims has no power to grant equitable relief.'") (footnote containing citations omitted); note 8, *supra*.

[14] For example, a division of jurisdiction would require two suits where Government action violates trust responsibilities to Indian Tribes. *See* Br. *Amici Curiae* of the Cheyenne-Arapaho Tribes of Oklahoma and the Southern Ute Indian Tribe. A similar division would affect the filing of (temporary) takings claims and injunctive claims against government action. *See First English Evanlegical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). *See also* Br. *Amicus Curiae* for Dico, Inc. (takings and due process claims must be filed in Claims Court, while Superfund statute, 42 U.S.C. § 9606(b)(2)(B), directs to district court actions challenging EPA denial of claim for reimbursement of environmental clean-up costs).

the merits is being conducted in that proceeding. It is particularly true where such a suit already has been dismissed by the district court on such grounds and what is "pending" is an appeal that may take years to be completed. During all of this time, the litigation of the claims against the Government, properly brought in the Claims Court, would simply be stalled. The resulting delay is unjust to the claimants as well as to the judicial system, not only because relief is postponed but because the passing of time may well result in the forfeiture of rights, and impairment of the truth-finding process, as evidence is lost over time.

The harm caused by the Federal Circuit's approach would be particularly severe, if, as that court may well have thought, equitable tolling would not be available in a new suit filed in the Claims Court after the actions outside that court are over.[15] If the statute of limitations were to run throughout the period of litigation in another forum, claims would predictably be lost. By the time that other litigation is completed, the entire claim in the Claims Court might be time-barred; alternatively, large parts of the claim might be barred, as earlier injuries resulting from a "continuing course of conduct" steadily become no longer actionable with the inexorable advance of the years. Thus delaying and denying justice based on a "technical" "jurisdictional" rule is not only unfair to litigants who are doing everything possible to secure a timely and accurate resolution of their claims, and wasteful of

[15] Although Chief Judge Nies suggested in her concurrence that equitable tolling should be available, the majority of the Federal Circuit did not adopt, or even address, that suggestion. And its (erroneous) view that Section 1500 is a true election-of-remedies provision tends to suggest the unavailability of such tolling.

As argued below (*see* pages 45-47, *supra*), equitable tolling should be held available here. This issue is intertwined with the merits of the Federal Circuit's reading of Section 1500 and therefore should be decided if the Court believes that other aspects of the relevant statutory analysis point toward acceptance of the Federal Circuit's reading.

judicial resources, but contrary to congressional policies against the loss of rights in just such circumstances.

This case illustrates how severe the delays and losses can be. Keene has vigorously sought to obtain an adjudication of its claims against the Government in an efficient manner. Given the nature of its claims, Keene had no choice but to bring its claims both under the FTCA and under the Tucker Act. Keene sought to do so in a manner that consolidated the thousands of related underlying claims into one proceeding in district court and one proceeding in the Court of Claims. It then took more than seven years, from the start of the New York case to the end of the District of Columbia case, to be told that the FTCA action could not proceed as brought. During that long period, if the Federal Circuit's rule had been in place, none of the pre-trial preparation that in fact occurred in the Claims Court during those years would have occurred: all litigation would have had to begin *after* that seven-year wait. And if the statute of limitations was running during that time, Keene would lose large shares of its claim against the Government—thousands of the underlying claims would fade into the nonactionable past—all through no fault of its own. Section 1500 should not be construed to produce such a result.

3. *The Federal Circuit's Approach Is Not Required By the Legislative History.*

The Federal Circuit rested its approach on its view that Congress intended Section 1500 to preclude duplicative litigation and to require an election of remedies. Pet. App. A14, A16; *Johns-Manville*, 855 F.2d at 1563. But, as an initial matter, Section 1500 is completely unnecessary to address the former concern: the ordinary rules of both claim and issue preclusion are fully available to prevent a party from relitigating claims and issues against the Government. *See, e.g., United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984); *Nevada v. United States*, 463 U.S. 110 (1983). And even aside from the clear congressional intent that both Tucker Act and

FTCA remedies be available to plaintiffs (*Hatzlachh Supply, supra*), neither a preclusion nor an "election of remedies" reading of Section 1500 can be sustained under the language of the provision itself. As the Government concedes: "The jurisdictional bar of Section 1500 remains in force until suit or process in the other court is terminated. Once the other suit is terminated, the plaintiff may then sue in the Claims Court, as long as the action is not barred by the statute of limitations." Br. in Opp. 11. Thus, Section 1500 is by its terms only a *timing* provision. *Id.* at 10 (section applies only while claims are pending in two courts "at the same time").

In this light, the Federal Circuit's reliance on legislative history was a mistake. What the Federal Circuit thought critical was the history of the original precursor to Section 1500—an 1868 Act.[16] But that is already some

---

[16] Section 1500, enacted in 1948, was based on Section 154 of the 1911 Judicial Code (Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1138), codified at 28 U.S.C. § 260 (1946), which read as follows:

> No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

That provision, enacted without congressional explanation, was a reenactment of Rev. Stat. § 1067 (1874), itself unaccompanied by explanation. The original precursor statute was Section 8 of the Act of June 25, 1868, ch. 71, 15 Stat. 77, which read as follows:

> And be it further enacted, That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of [sic] the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

distance from the provision actually at issue, enacted in 1948.[17] And, of course, substantial changes in the relevant statutory landscape governing the accessibility of the United States to suit—*e.g.*, the passage of the Tucker Act in 1887, the passage of the FTCA in 1946—were made after the 1868 Act. Those changes mean, in particular, that the United States today regularly faces multiple related suits outside the Claims Court, wholly unaffected by Section 1500: indeed, Keene itself could have filed third-party actions against the Government in each of thousands of suits outside the Claims Court. The 1868 Congress could hardly have addressed the role of Section 1500 in this new context—or intended that a multiplicity of separate suits in district courts was to be preferred to a single "consolidated" action in the Claims Court.

In any event, the legislative history of the 1868 enactment is sparse. During the Civil War, Congress had authorized seizure of Confederate property but then provided that claimants to the property could recover proceeds from the sale of the seized property in the Court of Claims by proving ownership, as long as they also proved that they had not aided the rebellion. Captured and Abandoned Property Act of 1863, ch. 120, § 3, 12 Stat. 820. Claimants for seized cotton, in addition to suing the United States in the Court of Claims, began suing federal officers in other courts, "presumably on a theory of conversion." Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Georgetown L.J. 573, 577 (1967). The 1868 Act was introduced with the following explanation by its sponsor, Senator Edmunds:

> The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.

Cong. Globe, 40th Cong., 2d Sess. 2769 (1868).

This passage does not offer any elaboration of the congressional understanding of when two claims were the "same" for purposes of the new statutory bar. Beyond that, the difficulty with the passage is that it says more about Senator Edmunds' goals than it does about what the statute itself actually says and does. Senator Edmunds seemed to hope for preclusion of a second adjudication after a first decision on the merits; but even this statement does not define when two claims were to be deemed the same, and in any event, Section 1500 simply cannot be read as a preclusion rule: as the Government has acknowledged, it is only a sequencing provision. Br. in Opp. 11. Similarly, the reference to "election" does not define when two claims were to be deemed the same; and it cannot, in any event, be read as forcing an election of remedies, except as to the timing of particular suits. *Ibid.*; pages 28-29, *supra*. All that Senator Edmunds' statement establishes, in the end, is a conclusion unhelpful to the definition of when two claims are to be considered the same—that behind the original statute lay a general policy seeking to protect the Government against the burdens of multiple simultaneous litigation. And that policy, at least in today's legal context, cannot support a reading of Section 1500 that predictably produces forfeitures of legal rights, especially since preclusion law and the au-

[17] The Revision Notes in 1948 say that "[c]hanges were made in phraseology." They contain that statement even though the enactment made an important substantive change in prior law: it extended the statutory bar to cases where the "other" suit was brought against the United States, thereby overturning this Court's decision 16 years earlier in *Matson, supra*.

thority to coordinate multiple litigation through stays fully effectuate the statutory policy.

The Federal Circuit believed that it had to adopt a broad "operative fact" theory in order to ensure that its view of the statute would cover the "cotton claims" that were the object of the 1868 legislation. *Johns-Manville*, 855 F.2d at 1564-65. But even if the 1868 intent were controlling, the court's inference would be wrong. The interpretation of Section 1500 that we advance does cover the cotton claims: a plaintiff could *not* bring separate suits against the United States both under a theory of common law conversion and under the Captured and Abandoned Property Act.

One reason is simply the special nature of the United States as a defendant: a cause of action for conversion was wholly unavailable against the United States because sovereign immunity had not been waived for torts. But even aside from the special sovereign immunity protections of the United States, the law against claim splitting in the nineteenth century apparently would have precluded the dual litigation of the cotton claims if both suits were brought against the same defendant. The conversion claim was a "lesser included offense" of the statutory claim growing out of the same transaction: *i.e.*, proof of the latter would have sufficed to prove the former. In that circumstance—at least where the plaintiff's injury and the defendant's wrong were the same (and only a "clean hands" qualification for suit distinguished the claims)—claim splitting evidently would have been barred under even the narrower res judicata principles then prevalent. *See Nevada v. United States*, 463 U.S. at 130 n.12; *The Haytian Republic*, 154 U.S. 118, 125 (1894); Restatement of Judgments § 61. The Federal Circuit's reason for departing from the standards of preclusion law is therefore invalid as well as insufficient.

B. Section 1500 Does Not Bar the Claims Court from Adjudicating a Case If the Plaintiff's Other Suit Is No Longer Pending.

Section 1500 declares that the Claims Court "shall not have jurisdiction of any claim" if the plaintiff "has pending" elsewhere certain other suits. The court of appeals read that language to mean that if a plaintiff had a suit pending in another court at the time it filed an action in the Claims Court, the Claims Court action must be dismissed—even after the other suit is over and even if neither the Claims Court nor the Government had raised the "jurisdictional defect" during years of litigation in the Claims Court. The court did not doubt that the Claims Court action could immediately be refiled—unless, of course, the statute of limitations had run. But it held that, under Section 1500, there can be no jurisdiction to adjudicate the original Claims Court case if there was no jurisdiction to receive the case on the docket at the time of filing. This ruling gives an improper reading to the statute, which should not be construed to bar adjudication of a case once no related suit is any longer pending.

1. *The "Jurisdiction" Language of Section 1500 Does Not Make the Time of Filing Dispositive.*

As a matter of ordinary usage, the Federal Circuit's ruling is hardly compelled by the statutory language, which does not by its terms tie jurisdiction to adjudicate to events at the time of filing. Any such reading could only be drawn by looking outside the language of the provision. The court of appeals reasoned that, because Section 1500 speaks of "jurisdiction," the statute must be construed by borrowing the general rule, drawn from diversity cases, that subject matter jurisdiction is determined by the facts upon filing. *See Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957). But there are good reasons why the borrowing and rigid application of that rule is unnecessary and, indeed, inappropriate here.

To begin with, the provisions surrounding Section 1500 suggest that "jurisdiction" be assessed at the time of rendering judgment. The various provisions in chapter 91 of Title 28, U.S. Code, define the "jurisdiction" of the Claims Court. In doing so, they repeatedly use the expression "jurisdiction to render judgment upon" interchangeably with "jurisdiction of [a claim or action]" and similar phrases. *See* 28 U.S.C. § 1491(a)(1) ("render judgment"), § 1491(b) ("of any civil action"), § 1494 ("determine . . . render judgment"), §§ 1495-1497, 1499 ("render judgment"), §§ 1500-1502 ("of any claim"), § 1503 ("render judgment"), § 1505 ("of any claim"), § 1507 ("to hear any suit for and issue a declaratory judgment"), § 1508 ("to hear and to render judgment upon"), § 1509 ("to hear"). Of course, if Section 1500 said that the Claims Court did not have "jurisdiction to render judgment upon a claim for or in respect to which" the plaintiff "has pending" another suit, its language would all but preclude any borrowing of the time-of-filing rule. The immediate context of Section 1500 thus supports our view.

So, too, does the inconsistency in the positions of the Government and Federal Circuit themselves about the borrowing of the time-of-filing rule. That rule does not work only one way: just as jurisdiction must generally exist at the time of filing, jurisdiction is generally not lost by virtue of events occurring after the filing. *See Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824). In particular, " 'where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court.' " *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964) (quoting *Peck v. Jenness*, 48 U.S. (7 How.) 612, 625 (1849)). Yet both the *en banc* Federal Circuit (Pet. App. A18-A19) and the Government (Br. in Opp. 9-10) take the opposite position: they argue that *Tecon Eng'rs* was wrong and hence that the Claims Court automatically loses jurisdiction if another case

is subsequently filed in another court (if it is "for or in respect to" the Claims Court claim).[18] They cannot have it both ways—insisting on the rigid "jurisdictional" character of Section 1500 so as to borrow the time-of-filing rule, while repudiating that rule when its consequences seem to them to undermine the statute's policy.[19]

In any event, even if the term "jurisdiction" suggests *looking* to the time-of-filing rule, there is no compulsion rigidly to adopt that rule. In fact, this Court has clearly recognized that, even as to the true grant of subject matter jurisdiction in the diversity context, the time-of-filing rule is not absolute: it has exceptions. Most notably, this Court has held that diversity jurisdiction, though not in fact present at the filing of a case, can retroactively be created by the dismissal of a non-diverse party—even while the case is on appeal. *Newman-Green*,

[18] If this view of *Tecon* is right, moreover, then this Court's decision in *Pennsylvania R.R. v. United States*, 363 U.S. 202 (1960), indicates that Section 1500 is not "jurisdictional" in the sense of a non-waivable constraint on subject matter jurisdiction. There, in an appeal from a decision of the Court of Claims, this Court raised no question about the lower court's jurisdiction—indeed, it necessarily presupposed jurisdiction in rendering its ruling that the case should simply be stayed—even though a district court action on the identical claim had been filed after the filing of the Court of Claims action (and was still pending), a fact that, under the Government's current view of Section 1500, would have barred jurisdiction under Section 1500. 363 U.S. at 203-04. If Section 1500 were a non-waivable matter of subject matter jurisdiction, the Court would have been obliged to consider the question and, on the Government's view of *Tecon*, hold that the Court of Claims lacked jurisdiction. *See, e.g., Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982) (Court must consider lower court's jurisdiction); *United States v. Corrick*, 298 U.S. 435, 440 (1936); *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379, 382 (1884).

[19] Similarly, it is hardly consistent with a view of Section 1500's "jurisdictional" character for the Government to have abandoned its Section 1500 argument in 1980 (based on the *later*-filed New York action) for " 'tactical' " reasons (12 Cl. Ct. at 199) or to have waited until 1987 before it finally sought dismissal under Section 1500 based on the pendency of other suits at the time of filing (and even then only after prompting by the Claims Court).

Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989). Thus, even when a case was outside any grant of affirmative jurisdiction during its entire pendency in the trial court, that defect—which is more than a defect of mere pleading—may be cured by post-filing events. The Court relied on practical considerations, explaining that "because law is an instrument of governance rather than a hymn to intellectual beauty, some consideration must be given to practicalities." *Id.* at 837 (internal quotation marks omitted).[20]

Such an approach is all the more strongly warranted for a provision like Section 1500. This provision does not define a federal court's power that otherwise would not exist. Jurisdictional grants like 28 U.S.C. §§ 1331 or 1332, by contrast, give federal courts their very power to act. If a court assumes jurisdiction nowhere given it by any such grant, the result is a kind of *ultra vires* usurpation of authority that implicates the fundamental constitutional principles of federalism (federal court authority, like any federal authority, displaces some state authority) and separation of powers (lower federal courts are created and generally must have their jurisdiction defined by Congress). *See Finley v. United States*, 490 U.S. 545, 552-53 (1989). Section 1500 is different: it applies, as here, in cases that the Claims Court has already been given the (exclusive) power to decide (by the Tucker Act) and thus does not implicate comparable concerns about usurpation of state or congressional authority. If retroactive "cures" of defects are appropriate even with re-

[20] *See also Willy v. Coastal Corp.*, 112 S. Ct. 1076, 1080 (1992) ("A final determination of lack of subject-matter jurisdiction of a case in a federal court, of course, precludes further adjudication of it. But such a determination does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction."); *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976) (noting that Court has followed a "'practical' approach" in applying the finality requirements of 28 U.S.C. §§ 1257 and 1291 "so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered").

spect to grants of subject matter jurisdiction, as in *Newman-Green*, they are all the more obviously appropriate for a mere litigation-coordination provision like Section 1500.[21]

Indeed, this Court has made clear in analogous contexts that quite similar "jurisdictional" constraints are not necessarily rigid, but may be flexibly construed in accordance with relevant policies. For example, as the Government has explained in this case, the extent of the Government's waiver of sovereign immunity, including in statutes of limitation governing suits against the United States, defines the jurisdiction of the court over such suits. Br. in Opp. 13 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)) ("the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction'") (in turn quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *see also United States v. Mitchell*, 463 U.S. at 212 ("It is axiomatic that . . . the existence of consent is a prerequisite for jurisdiction."). Yet, as this Court has made clear, equitable tolling—a highly practical doctrine keyed to promoting justice—applies to statutes of limitations in suits against the United States. *Irwin v. Veterans Admin., supra.*

Similarly, in the Social Security setting (and related disability and Medicare contexts), this Court has made

[21] This result is particularly appropriate as applied to *Keene I*, which was held barred because the third-party action in *Miller* was pending when *Keene I* was filed. *Miller* was voluntarily dismissed without prejudice. It is well-established that such a dismissal "leaves the situation as if the action had never been filed." 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2367, at 186 (1971 & Supp. 1992) (citing cases); *see Brown v. Hartshorne Pub. School Dist. No. 1*, 926 F.2d 959, 961 (10th Cir. 1991); *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83, 86 (1st Cir. 1990); *Navajo Tribe of Indians v. United States*, 601 F.2d 536, 540 (Ct. Cl. 1979); *Humphreys v. United States*, 272 F.2d 411 (9th Cir. 1959); *A.B. Dick Co. v. Marr*, 197 F.2d 498, 502 (2d Cir.), *cert. denied*, 344 U.S. 878 (1952); *Maryland Cas. Co. v. Latham*, 41 F.2d 312 (5th Cir. 1930).

clear that the exhaustion requirement of 42 U.S.C. § 405(g) is "central to the requisite grant of subject matter jurisdiction." *See Weinberger v. Salfi*, 422 U.S. 749, 764 (1975). At the same time, the Court has recognized that this "statutorily specified jurisdictional prerequisite" is "not precisely analogous to the more classical jurisdictional requirements contained in such sections of Title 28 as 1331 and 1332." *Id.* at 766. The Court has in fact held that not all of those requirements are "purely 'jurisdictional' in the sense that [they] cannot be 'waived'" or, indeed, subjected to judicial abrogation where practical and equitable considerations demand. *See Mathews v. Eldridge*, 424 U.S. at 328.[22] There is no more reason why Section 1500, a timing provision somewhat like an exhaustion rule, requires the rigid interpretation adopted by the Federal Circuit. The language of "jurisdiction" does not compel that reading.

2. Section 1500's History and Policy Allow Adjudication of the Claims Court Suit Once the Plaintiff's Other Suit Is Over.

If the language of Section 1500 does not by its terms answer the question, the relevant history and policy do. Until the Federal Circuit's ruling in this case, clear and longstanding precedent established that a "defect" at the time of filing did not oust the Court of Claims (and its successor court) of the power to adjudicate the case. While this Court has not spoken to the issues in its few decisions under Section 1500 or its predecessor statutes,[23]

[22] In another context, this Court held in *Gomez v. United States*, 490 U.S. 858, 876 (1989), that a magistrate lacked "jurisdiction" to select a jury. Two Terms later, however, without repudiating that characterization, the Court held, at the urging of the Government, that the "jurisdictional" label did not prevent a party from waiving the right. *Peretz v. United States*, 111 S. Ct. 2661 (1991); Br. for United States in *Peretz*, No. 90-615, at 24. As the United States there pointed out, "The word 'jurisdiction' is a 'many-hued term.'" *Ibid.* (quoting *United States v. Wey*, 895 F.2d 429, 431 (7th Cir.), *cert. denied*, 110 S. Ct. 3283 (1990)).

[23] In *Corona Coal Co. v. United States*, 263 U.S. 537 (1924), the plaintiff received an adverse Court of Claims decision on the merits,

the Court of Claims repeatedly did, establishing the clear rule that pendency of another case at the time of filing did not preclude later adjudication once the other case was over.

In *Brown v. United States*, *supra*, the Court of Claims, having earlier dismissed the case while the same claim (a takings claim) was pending in a district court, vacated the dismissal once the district court had dismissed the claim. 358 F.2d at 1004-05. The court held that, once the other action was "no longer 'pending in any other court,' . . . [t]he plaintiffs could undoubtedly file a new petition, without any bar through Section 1500; it does not seem fair or make sense to insist that that must be done—with the limitations difficulties it may well entail." *Ibid.* The court also observed that "Section 1500 was not intended to compel claimants to elect, at their peril, between prosecuting their claim in this court (with conceded jurisdiction, aside from Section 1500) and in another tribunal which is without jurisdiction." *Id.* at 1005. The court thus allowed adjudication of the case once the other suit was over.[24]

then took an appeal to this Court; but before the appeal, he filed the very same cause of action in another case. This Court dismissed the appeal under Section 1500's predecessor (Section 154 of the 1911 Judicial Code), rejecting a plea of necessity and relying on the plain words of the statute: the other case involved the identical claim and was still pending. *Id.* at 540. In *In Re Skinner & Eddy Corp.*, 265 U.S. 86 (1924), the Court, after holding that the plaintiff in the Court of Claims action had a right to voluntarily dismiss its case, went on to note that a post-dismissal action in another court on the very same cause of action made it impossible in any event, under Section 154, to resume the Court of Claims action. *Id.* at 96. And in *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932), the Court held, based on the literal terms of Section 154, that the provision did not apply where the other pending suit was against the United States. (In 1948, Section 1500 was written specifically to change this ruling.) None of these cases involved, or addressed, the issue of barring a Court of Claims action after the other suit was over.

[24] The court distinguished the one prior case, under Section 1500's predecessor, where the related action was no longer pending when

The natural implication of *Brown*'s holding was subsequently drawn: a case in the Court of Claims should be suspended, not dismissed, when the same claim is pending elsewhere *Hossein v. United States*, 218 Ct. Cl. 727 (1978). This practice—or its equivalent, dismissal subject to automatic reinstatement *nunc pro tunc*—became the settled practice in the Court of Claims and, later, the Claims Court and Federal Circuit. *See Prillman v. United States*, 220 Ct. Cl. 677 (1979); *National Steel & Shipbuilding Co. v. United States*, 8 Cl. Ct. 274 (1985); *Boston Five Cents Sav. Bank, supra; Connecticut Dep't of Children & Youth Servs. v. United States*, 16 Cl. Ct. 102 (1989). And this reading not only is entitled to respect under *stare decisis* but was effectively ratified in 1982, when Congress amended the provision without changing anything but the court to which it applied. *See* pages 22-23, *supra*.

No other evidence of congressional intent requires a different conclusion. The pre-1948 language, though addressed to both filing and prosecution of a case, is not of course the present language. More important, nothing in that language would require the rigid view that an improper filing was a non-waivable jurisdictional defect, which forever barred adjudication of the case, regardless of practical and equitable considerations. Moreover, as already noted (*see* pages 29-30, *supra*), any reliance on the 1868 history is dubious given the transformations of the surrounding legal landscape that have occurred since then. As also already noted, the legislative history of the original 1868 provision does not support anything

---

the Court of Claims dismissed the case before it, *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940). The court in *Brown* observed that *British American* had "emphasized several times that the determination of the other court was on the merits." 358 F.2d at 1005 (citing 89 Ct. Cl. at 441). The *Brown* court thus treated *British American* as in essence a preclusion case—which it plainly would be today, now that mutuality is not a requirement for preclusion. *See Blonder-Tongue Lab., Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971).

but the conclusion that a general policy against simultaneous dual litigation underlies the provision.

That policy simply does not support the Federal Circuit's rigid and "jurisdictional" rule that dismissal is automatically required of an action in the Claims Court if it was filed at a time when another suit was pending elsewhere. This case perfectly illustrates why. Not only did the intended beneficiary of the statute not invoke it to escape supposed burdens of litigation for close to a decade—and even then only at the prompting of the court—but now, years after any other suit is pending, there cannot any longer be any simultaneous multiple litigation. The only conceivable benefit to the Government from such a dismissal is the running of the statute of limitations, which is, at least under current law, an illegitimate benefit. Moreover, any concerns about giving parties a "second bite at the apple" are fully addressed by the law of issue and claim preclusion. The policy against multiple simultaneous litigation thus cannot support the Federal Circuit's bar on adjudication in these circumstances. Indeed, the Federal Circuit's reading could have the perverse effect of undermining Section 1500's general policy by forcing claimants like Keene to file thousands of third-party actions in district court, unconstrained by Section 1500.

Section 1500's litigation-coordination policy is thus satisfied by reading it as decisional law did for a quarter century prior to the *en banc* decision in this case. The proper way to "avoid duplicative litigation" is not through any "precise rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952) ("Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solutions of such problems."). It is instead through the more flexible and traditional approach of staying proceedings where appropriate. A proceeding in the Claims Court may be

stayed pending resolution of another suit if the other suit is closely enough related that substantial savings of litigation resources can be expected from allowing the other suit to proceed to resolution.[25] Most obviously, this will be true when major issues in the Claims Court proceedings will be resolved, with preclusive effect, in the other suit. By contrast, no stay would be appropriate where, for example, the other case does not involve litigation on the merits, at least while it is on appeal from dismissal for jurisdictional reasons.

Although the authority and responsibility to stay proceedings to avoid multiple overlapping litigation does not derive only from Section 1500, the provision performs two important, if modest, roles. First, it bars the Claims Court from actually adjudicating a claim covered by the provision. Second, it changes the usual rules governing the coordination of multiple suits. The normal rule is that the first-filed suit is the one to go forward. *See Smith v. M'Iver*, 22 U.S. (9 Wheat.) 532, 535 (1824). Section 1500 makes clear that in this context, regardless of which case is filed first, the Claims Court must be the one to defer. *See Pennsylvania R.R., supra.* The modesty of these functions is appropriate to the statutory policy.

II. EVEN IF THE FEDERAL CIRCUIT'S CONSTRUCTION OF SECTION 1500 IS CORRECT, PETITIONER'S CLAIMS SHOULD NOT BE BARRED.

If this Court concludes that Section 1500 was properly construed by the Federal Circuit, it should nevertheless make clear that petitioner's Tucker Act claims against the United States are not barred. First, any such ruling would indisputably establish a new rule of law, and the application of that rule to Keene, which relied on contrary prior law that is now overruled, would be highly inequitable. Despite the "jurisdictional" label, this rule should be applied only prospectively, and not require dismissal here, whether as a matter of choice of law or as a matter of remedial law. *See American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Second, and in any event, the Court should make clear that Keene may present these claims—either through an amended or supplemental pleading or by a new complaint—and not face a statute-of-limitations bar: this is a classic case for equitable tolling during the pendency of the present suits if they are held to have been jurisdictionally defective.

[25] In fact, there is no reason why suspension of proceedings should automatically require that the other suit meet the "claim for or in respect to" standard of Section 1500.

A. Retroactive Relief Is Not Appropriate.

In *Chevron Oil*, this Court held that a decision may be applied only prospectively based on a three-factor test focusing on the upsetting of reliance interests. 404 U.S. at 106-07. In *American Trucking Ass'ns v. Smith*, four Justices applied that test to the question of retroactivity as a matter of choice of law (496 U.S. at 176-200 (O'Connor, J., joined by Rehnquist, C.J., White, J., and Kennedy, J.)), while four Justices indicated that they viewed the *Chevron* analysis as establishing a remedial principle, particularly in the area of statutes of limitations (*id.* at 219-24 (Stevens, J., joined by Brennan, J., Marshall, J., and Blackmun, J.)). That dispute need not be resolved in the present case, where the remedial law and the "substantive" law are both *federal* law subject to this Court's authoritative pronouncement. Here, whether as a choice-of-law principle or as a remedial principle, the *Chevron* doctrine is appropriately applied.

There can be no doubt that *Chevron* calls for pure prospectivity in this case if the Court adopts the Federal Circuit's reading of Section 1500. First, that reading establishes "a new principle of law . . . by overruling clear past precedent on which litigants may have relied." *Chevron*, 404 U.S. at 106. Second, the purpose of Section 1500 is only to define the sequence of multiple litigation against the Government; that purpose would not be served, indeed it would be retarded, by applying Section 1500 now to bar jurisdiction over claims in the Claims

Court once the plaintiff's other litigation is over. *Id.* at 106-07. Third, retroactive application of the new rule to require dismissal of the present complaints, as the Federal Circuit held, "could produce substantial inequitable results." *Id.* at 107. After all, Keene filed these cases more than a decade ago, at a time when clear law permitted it to do exactly what it did, and was never told until the Claims Court ruling in 1989 that it may have made a misstep in 1979 and 1981. Any ruling that would bar these claims, and allow the United States to escape an adjudication of its liability on these claims (reaching as far as back as the limitations period would allow for suits filed in 1979 and 1981), would produce manifest "injustice" and "hardship" that should be avoided by a holding of nonretroactivity. *Ibid.*

The Federal Circuit rejected application of *Chevron* on the simple ground that " 'by definition, a jurisdictional ruling may never be made prospective only.' " Pet. App. A23 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981)). That ground is insufficient. In addition to the fact that this Court made a jurisdictional ruling prospective in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the provision at issue in this case, even if "jurisdictional" in a sense sufficient to implicate the "time of filing" rule, need not and should not be treated as "jurisdictional" in the sense that was critical in *Firestone*. There, the Court's decision made clear that the case was wholly outside any grant of power to the court of appeals to hear cases (there was no "final decision" reviewable under 28 U.S.C. § 1291); in that situation, the court was effectively acting *ultra vires* when it adjudicated the merits of the case (*i.e.*, the validity of the appealed order). In the present situation, by contrast, the Claims Court has explicitly been granted power under the Tucker Act, 28 U.S.C. § 1491, to hear and to decide precisely this type of case. And even if Section 1500 may have originally barred the filing of the case, the Claims Court is hardly acting *ultra vires* when—after no other suit is pending

—it adjudicates the merits of the case.[36] In these circumstances, therefore, application of *Chevron* principles to preclude retroactive relief is proper.

B. Equitable Tolling Is Necessary.

Even if this Court were to adopt the Federal Circuit's interpretation of Section 1500, it should make clear that, if Keene refiles the same claims, equitable tolling would be available to eliminate any limitations bar. Refiling may occur either through the filing of a new complaint or through an amended or supplemental complaint under Rule 15 of the Rules of the Claims Court—identical to Rule 15, Fed. R. Civ. P. In both situations, however, the central issue in a case such as this is whether equitable tolling of the statute of limitations is available. Thus, even when a new pleading in the original case relies on occurrences post-dating the original filing (*see* Rule 15(d)), relation back of the pleading is appropriate where, as here, the very same claims are alleged, the defendant is not conceivably prejudiced, and the "supplemental complaint alleges an occurrence that corrects a defective allegation of jurisdiction," at least as long as the statute of limitations has not run. 3 J. Moore & R. Freer, *Moore's Federal Practice* ¶ 15.16[2.-2], at 15-183 to 15-184 (2d ed. 1992); *see Fujii v. Dulles*, 224 F.2d 906 (9th Cir. 1955); 6A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure: Civil 2d* § 1508, at 200-05 (1990). In this case, then, the only question is whether equitable tolling should suspend the running of the 6-year statute of limitations for Tucker Act claims,

[36] This distinction is mirrored in the rule that a final judgment generally may not be collaterally attacked on the ground that the court lacked subject matter jurisdiction—*unless* "there is a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority." *Kansas City S. Ry. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir.), *cert. denied*, 449 U.S. 955 (1980). *See Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940); Restatement (Second) of Judgments § 12(2); 7 J. Moore, *Moore's Federal Practice* ¶ 60-25[2], at 60-228 to 60-230 (2d ed. 1992).

28 U.S.C. § 2401(a), during the pendency of these cases in the Claims Court.

That question has a clear answer in the present circumstances. This Court held in *Irwin v. Veterans Admin.*, 111 S. Ct. at 457-58, that equitable tolling of statutes of limitations is available in suits against the United States. Such tolling is appropriate "where the claimant has actively pursued his judicial remedies by filing a defective pleading." *Id.* at 458.[27] The central requirement is that the plaintiff not have "slept on his rights but, rather, has been prevented from asserting them." *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 429 (1965). This case fits squarely under that description.

Following the clear law in the area, Keene did everything possible to preserve its Tucker Act claims. Keene was required to pursue claims under different statutes in different courts: Congress has routed the different claims to different courts—the FTCA claims to district court, 28 U.S.C. § 1346(b); the Tucker Act claims for more than $10,000 to the Claims Court, 28 U.S.C. § 1491(a)(1). This Court has made clear that Congress did not intend that a plaintiff have to elect one or the other remedy, but was entitled to pursue remedies under both the FTCA and the Tucker Act. *See* page 21, *supra*. The decisional law under Section 1500, as we have discussed and as the Federal Circuit acknowledged, permitted Keene to file both cases simultaneously. Moreover, the Government did not make a move to raise a Section 1500 issue until years after the litigation had been commenced. (Had the new rule been announced, of course,

[27] This is supported by the congressional policy embodied in 28 U.S.C. § 1631, which authorizes a court without jurisdiction to transfer a case, rather than dismiss it, for the specific purpose of avoiding limitations problems. *See also Herb v. Pitcairn*, 325 U.S. 77, 78-79 (1945) (case is "commenced" for federal limitations purposes even if filed originally in state court lacking jurisdiction, at least if applicable state law permits transfer rather than requires initiation of new suit).

Keene would have had the opportunity to decide not to bring any other action and to pursue the Claims Court actions alone, or at least to drop the other actions and file new Claims Court actions long before almost a decade had elapsed since the filing of these cases.) Thus, if ever there were a case for equitable tolling to prevent the loss of rights by a party that vigilantly pressed them, this is it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD G. TARANTO
Counsel of Record
JOEL I. KLEIN
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

JOHN H. KAZANJIAN
IRENE C. WARSHAUER
MARY BETH GORRIE
ANDERSON KILL OLICK & OSHINSKY, P.C.
666 Third Avenue
New York, NY 10017

STUART E. RICKERSON
Vice President-General Counsel
JOHN G. O'BRIEN
Associate General Counsel
KEENE CORPORATION
200 Park Avenue
New York, NY 10166

Dated: December 10, 1992